ILE COPY

Office-Supreme Court, U.S.
FILED
FEB 1 1965
JOHN F. DAVIS, CLERK

No. 826

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1964

ROBERT C. SWITZER and RICHARD A. WARD,
Cross-Petitioners-Respondents,

vs.

LOY W. SOCKMAN and ELLIOTT W. BRADY,
Cross-Respondents-Petitioners.

BRIEF OPPOSING CROSS-PETITION FOR WRIT OF CERTIORARI

BENTON BAKER
FOSTER YORK
105 W. Adams Street
Chicago, Illinois
Counsel for
Cross-Respondents-Petitioners.

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LAkeview 5-6581

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1964

No. 826

ROBERT C. SWITZER and RICHARD A. WARD,
Cross-Petitioners-Respondents,

vs.

LOY W. SOCKMAN and ELLIOTT W. BRADY,
Cross-Respondents-Petitioners.

BRIEF OPPOSING CROSS-PETITION FOR WRIT OF CERTIORARI

Statement

The cross-petition propounds no question requiring exercise of the jurisdiction of the Court. The questions presented are not supported in the record. The stated reasons for granting the writ are inadequate.

Cross-petitioners' statement of the case tends to slight the record in that it omits some matter of interest[1] and assumes the presence of other matter not found there as we shall point out.

Questions 1 and 2

The statement of the questions does not accurately reflect a condition of the instant case. The use of the term "cross-appellant" assumes a right of appeal under 35 USC 141, but appellees had none for the decision of the Board was in their favor, namely, an award of priority to them.[2]

---

[1] It seems proper, by way of background, to note additionally that cross-petitioners' 1955 application was filed as a *continuation* (that is, the same in substance) of their 1945 application but, because of new matter therein (matter not present in the 1945 case), was required to be amended and re-designated a *continuation-in-part*. See the decision of the Board (No. 715, Petitioners' Appendix B, App. 19, 22), which also notes (App. 26) the 1945 application as having been litigated in *Ward*, 43 CCPA 1007, 236 F. 2d 428, wherein its claims were held unpatentable over an earlier Ward patent, the filing date of which cross-petitioners sought to obtain for their 1955 application in this case, thus admitting substantial identity of the Ward patent, the 1945 application and the 1955 application (RI-395).

[2] Cases of interest on this point include:

Nenzell v. *Hutson*, 49 CCPA 929, 299 F. 2d 864, 132 USPQ 635 (1962).

Klemperer v. *Price*, 47 CCPA 729, 271 F. 2d 743, 123 USPQ 539 (1959).

Wettlaufer v. *Robins*, 92 F. 2d 573 (2 Cir. 1937).

Hygienic Products v. *Coe*, 85 F. 2d 264 (CADC 1936).

General Electric Co. v. *Hygrade Sylvania Corporation*, 61 F. Supp. 476, 500 (SDNY 1944).

The character and jurisdiction of the Court of Customs and Patent Appeals generally are considered in *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 558, 8 L. Ed. 2d 671, 82 S.Ct. 1459 (1962).

The points which appellees raised in their brief before the lower court were pertinent to appellants' (cross-petitioners' here) assignment of error 6 (R. II - 812, 814), namely, that the Board erred in not awarding priority to them (the senior party).

The pertinence of the points to the question of priority is supported by numerous decisions extending over many years. Especially is right to make an interference count implicit in priority of invention thereof.[3]

Question 3 and 4

These questions are broader than the facts of the instant case, hence misrepresentative and non-justiciable.

Question 3 assumes that the lower court has *entertained and reviewed* specific factual issues which had been previously considered and decided by another court. This the lower court did not do. The lower court merely decided that the Board did not give proper consideration to evidence of record which might be regarded as countervailing in view of the fact that appellees (petitioners and cross-respondents) were not party to the Section 145 action[4], and hence, in effect, that the case was not in condition to enable the lower court to decide the appeal as to the sixth reason of appeal urged by appellants (cross-petitioners here).

All that the remand contemplates is that appellees (petitioners and cross-respondents) be accorded the freedom to litigate which is their right as strangers to that action. That does not entail a determination of whether or not

---

[3] *Klemperer* v. *Price, supra.*

[4] Decision below; Petitioners' Appendix A, App. 1, 16.

the district court was right or wrong in its judgment on the evidence before it.

Any interpretation of 35 USC 145 which would undercut the principles of *res adjudicata* to deprive one not a party or in privity with one of his independent right to litigate, or indeed put an applicant for patent in any better position vis-a-vis a rival under 35 USC 135 than he would have been by voluntary ruling of the Commissioner in the first instance would be untenable.[5]

Question 5

To the extent that this question may be deemed articulate and justiciable, which cross-respondents dispute, it does not appear to have been the subject of a reason of appeal or of decision or ruling by the lower court in rendering that part of the judgment of which review is sought.

It may be noted that 35 USC 24 in no-wise relates or extends to or authorizes substantive application of the Rules of Civil Procedure in the determination of the admissibility of evidence in an interference proceeding. To the extent that it was invoked in the instant case it was invoked for the substantive purpose of excluding evidence, not for the purpose of compelling the attendance of witnesses or the production of documents. In any event the lower court properly did not consider the point.

---

[5] It is of interest here, though cross-petitioners failed to mention it, that the evidence in their Section 145 action consisted only of the testimony of a single witness in the person of the house attorney for cross-petitioners' assignee doubling as an expert witness who later admitted that his testimony was wrong in an important respect. (RII-697-8).

Question 6

The subject matter of this question, while included in a reason of appeal (R. II - 812, 814; No. 5), was stated to be moot in appellants' brief in the lower court (p. 7, note 4), and was not considered or passed upon in rendering the judgment of which review is sought by the cross-petition.

The Stated Reasons For Granting The Writ Are Ill-Founded

Predicated largely on strained notions of the state of the record and the statutes, rules and precedents relied on, the stated reasons are more fanciful than factual, confused rather than articulate, declamatory rather than reasoned.

The statement (p. 11, 2d par.) that the court below "continued to exclude cross-appeals from the procedural limitation on the scope of its decisions" etc., is an undocumented, irrelevant generality so far as concerns this case, there having been no cross-appeal, nor any basis for one as has been pointed out.

Oddity of diction aside, the commentary of the following paragraph on the decisions of the lower court in the instant case and in *Henning* v. *Hunt* not only errs in evaluating the decisions but assumes a non-existent right of intervention. This will be apparent upon considering those decisions together with *Turchan* v. *Bailey Meter Co.* cited by cross-petitioners (p. 12) and by the lower court, which noted like reasoning of the two courts in comparable situations.[6]

The disquisition (p. 12) on rules of procedure must be regarded as gratuitous in view of the previously noted

[6] Decision below; Petitioners' Appendix A, App. 1, 17, footnote 11.

absence of ruling on the subject by the court below and cross-petitioners' admission that it had become moot. And is it not a vain rhetorical quirk that finds fault with petitioners (cross-respondents and appellees) for choosing to abide by their adversaries' selection of an appellate forum instead of exercising a statutory option under 35 USC 141 to have an alternative review under 35 USC 146.

The observations on public interest and the accompanying outburst against the Patent Office and the lower court (pp. 13, 14) lose force when viewed against the background of cross-petitioners' intransigence above-indicated.[7]

The cross-petition should, it is urged, be denied.

Respectfully submitted,

BENTON BAKER,
FOSTER YORK,
Counsel for Cross-Respondents, Petitioners.

---

[7] Page 2, footnote 1.